IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 124 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

DHIRAJLAL PREMJIBHAI

Appearance:

1. Criminal Appeal No. 124 of 1992

MR DP JOSHI, APP for the appellant

MS KRINA C THAKKAR for MR YOGESH S LAKHANI for the respondent

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 12/10/2001

ORAL JUDGEMENT

The acquittal of the respondent of the offences punishable under sections 409 and 477-A of the Indian Penal Code recorded by the learned Additional Sessions

Judge, Junagadh vide judgment dated November 25, 1991 rendered in Criminal Appeal No. 45/89, is the subject matter of challenge by the State of Gujarat in the present appeal which is filed under section 378 of the Code of Criminal Procedure, 1973.

2. At the relevant time, the respondent was performing duties as Sub-Post Master in the Post Office situated at village Nanadia, Taluka : Manavadar, District Junagadh. According to the prosecution, one Champagauri had deposited a sum of Rs. 10,000/- (Rupees Ten Thousand only) on November 27, 1982, but the respondent had retained the said amount with him and credited the said amount in the account of Champagauri on December 23, 1982. It was also the case of the prosecution that one Bhimabhai Meraman had given a sum of Rs. 15,000/- (Rupees Fifteen Thousand only) to the respondent on March 12, 1982 for opening a Yearly Deposit Account, but the respondent had credited the said amount in the account of Bhimabhai Meraman on June 22, 1982. What was claimed by the prosecution was that the respondent had opened different accounts in his name,in the name of his wife and in the name of minor daughters on December 23, 1982 and had posted bogus entry indicating that a total sum of Rs. 88,000/- (Rupees Eighty Eight Thousand only) was to his credit and also to the credit of his wife and minor daughters. Further the case of the prosecution was that on December 23, 1982, a total sum of Rs. 2,13,400/- (Rupees Two Lacs Thirteen Thousand Four Hundred only) was received, regarding which entry was posted by the respondent, but the said amount was retained by him upto December 28, 1982 and that the said amount was deposited in Batva Sub-Post Office only on December 28, 1982. Thus, the case of the prosecution was that the respondent had committed offences punishable under sections 409 & 477-A of the Indian Penal Code. The complaint in the case was filed by one Mr. P.V.Shah, who was then Assistant Superintendent of Post Offices on February 12, 1985 with Manavadar Police Station. The complaint lodged by Mr. Shah was investigated by Mr. A.D.Chauhan, P.S.I. of Manavadar Police Station. On conclusion of investigation, the respondent was chargesheeted in the Court of learned J.M.F.C., Manavadar of the offences punishable under sections 409 & 477-A of the Indian Penal Code. The charge at Exh.9 was framed against the respondent of the offences punishable under sections 409 & 477-A of the Indian Penal Code. The charge was read over and explained to the respondent, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, had examined, in all, seven witnesses, to prove its case against the respondent. The

documentary evidence, such as, pass-books, different entries from the registers, etc. was also produced by the prosecution in support of its case against the respondent. After recording of evidence of the prosecution witnesses was over, the respondent had examined his brother i.e. Mansukhbhai Premjibhai as defence witness no.1 at exh.81. The learned Magistrate had explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses and had recorded his statement as required by section 313 of the Code of Criminal Procedure, 1973. In his further statement,the respondent had claimed that the case of the prosecution against him was false.

3. On appreciation of evidence, the learned Magistrate came to the conclusion that the charges levelled against the respondent were proved beyond reasonable doubt. In view of the said conclusion, the learned Magistrate by judgment dated November 30, 1989 convicted the respondent of the offences punishable under sections 409 & 477-A of the Indian Penal Code and punished him with simple imprisonment for three months and fine of Rs. 500/- i/d. S.I. for 15 days for offence under section 409 I.P.C. as well as simple imprisonment for three months and fine of Rs. 250/- i/d. S.I. for ten days for offence under section 477-A I.P.C.

4. Feeling aggrieved by the said order of conviction and sentence passed by the learned J.M.F.C.,Manavadar, the respondent preferred Criminal Appeal No. 45/89 in the District Court at Junagadh. The learned Additional Sessions Judge, Junagadh, who heard the appeal, has allowed the same by judgment dated November 25, 1991, giving rise to the present appeal.

5. Mr. D.P.Joshi, the learned counsel for the State Government, after taking me through the entire evidence on record, submitted that as the prosecution has established beyond reasonable doubt that the respondent was entrusted as well as had dominion over the money belonging to the different account holders and Government and as the respondent had failed to deposit the same in due time, the conviction of the respondent recorded by the learned J.M.F.C.,Manavadar should be restored. What was claimed was that the learned Judge of the Appellate Court has not only misappreciated the evidence on record, but has also misconstrued the provisions of law and, therefore, the appeal should be accepted.

6. Ms. Krina C.Thakkar, learned counsel for the respondent, submitted that except proving temporary

retention of money, the prosecution has not proved that the retention of money for temporary period by the respondent was with an intention to misappropriate the amount dishonestly, nor it has been established that the respondent had destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account wilfully and with intention to defraud the Government and, therefore, the appeal should be dismissed. In support of her submissions, the learned counsel for the respondent placed reliance on the decisions rendered in (1) Lala Raoji Mahale v. Emperor, A.I.R. 1928 Bombay 205, (2) Champaklal Nemchand v. The State, 2 G.L.R. 262, and (3) Bhanubhai Rambhai v. State of Gujarat, 17 G.L.R. 699.

7. I have taken into consideration the submissions advanced at the Bar and reappreciated the whole evidence on record. In my view, the prosecution has not led reliable evidence to prove its case that one Champagauri had deposited a sum of Rs. 10,000/- (Rupees Ten Thousand only) in her account on November 27, 1982 and that the said amount was credited in her account by the respondent on December 23, 1982. Witness Vallabhbhai Nagjibhai PW.2 Exh.19, who is the husband of Champagauri has not stated in his evidence that he had gone to the Post Office of village Nanadia on November 27, 1982 for the purpose of depositing Rs. 10,000/- (Rupees Ten Thousand only) in the account of his wife. In the receipt which is issued to the person who had deposited the amount,it is clearly indicated that the amount was deposited on December 23, 1982. Exh.30, is receipt book and in the receipt book also it is mentioned that a sum of Rs. 10,000/- (Rupees Ten Thousand only) was received on December 23, 1982. Further the list of transactions produced at Exh.31 also makes it very clear that a sum of Rs. 10,000/- (Rupees Ten Thousand only) was received on December 23, 1982. The case of witness Vallabhbhai Nagjibhai before the Court was that he had deposited a sum of Rs. 10,000/(Rupees Ten Thousand only) on November 22, 1982, which is not the case of the prosecution at all. Having regard to the facts of the case, I am of the opinion that the learned Judge of the Appellate Court was justified in coming to the conclusion that it was not satisfactorily proved by the prosecution that Champagauri had deposited a sum of Rs. 10,000/- (Rupees Ten Thousand only) in her account on November 27, 1982 and that the said amount was credited in her account by the respondent only on December 23, 1982.

8. The second default, which according to the prosecution was committed by the respondent, was that one

Bhimabhai Maraman had deposited a sum of Rs.15,000/(Rupees Fifteen Thousand only) on March 12, 1982, but the said amount was credited in his account by the respondent on June 22, 1982. The learned Appellate Judge has on appreciation of evidence, recorded a finding that the fact that Bhimabhai Meraman had deposited a sum of Rs. 15,000/- (Rupees Fifteen Thousand only) on March 12, 1982 and that the said amount was credited by the respondent in his account on June 22, 1982,is established by cogent evidence. However, according to the learned Judge it was not proved by the prosecution that the respondent had temporarily retained the said amount with intention to misappropriate the same dishonestly. Again,the learned Appellate Judge on appreciation of evidence has held that on December 23, 1982 the respondent had opened different accounts in his name, in the name of his wife and in the names of his minor daughters and had tried to show as if Rs. 88,000/(Rupees Eighty Eight Thousand only), in all, were deposited, but the said amount was written off by the respondent. Further the learned Appellate Judge has also held that though the respondent had received a sum of Rs. 2,13,400/- on December 23, 1982, he had deposited the said amount with Batva Post Office only on December 28, 1982. However, according to the learned Appellate Judge, the prosecution has failed to prove that there was dishonest intention on the part of the respondent either to misappropriate the said amount or to convert the said amount for his own use or that he had falsified the books wilfully and with intent to defraud the Government.

9. In this regard, it is worthwhile to notice that the learned Single Judge of this Court while explaining the scope of section 405 I.P.C. has held in Champaklal's case as under :-

> "Temporary retention of money would not by itself amount to criminal breach of trust. Retention of property entrusted would amount to the offence under section 405 I.P.C. only if from the fact of retention of property, the second ingredient, namely, dishonest misappropriation or conversion etc. can be correctly inferred. The mere failure to deposit the money would not, therefore, prove dishonesty and there must be other circumstances to prove the element of dishonesty and unless the element of dishonesty is proved, the mere retention of money would not by itself constitute the offence of criminal breach of trust."

In S.Harman Singh v. State (Delhi Admn.) AIR 1976 SC 2140, the Supreme Court has construed the scope of section 477A of the Indian Penal Code and held that in order to bring home an offence under this provision, the prosecution has to establish (1) that at the relevant time, the accused was a clerk, officer or servant; (2) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc. and (3) that he did so wilfully and with intent to defraud. Explaining the meaning of word, 'Wilfully', the Supreme Court has ruled that 'wilfully' as used in section 477A means 'intentionally' or 'deliberately' and the mere fact that certain entries were made wilfully by an accused, does not necessarily follow that he did so with intent to defraud within the meaning of section 477A. According to the Supreme Court, the Indian Penal Code does not contain any precise and specific definition of the words, "intent to defraud", but the expression "intent to defraud" contains two elements, viz. deceit and injury and a person can be said to deceive another when by practising 'suggestio falsi' or 'suppressio veri' or both, he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. Applying the principle laid down by the Supreme Court in the above-referred to decision to the facts of the present case, I find that except proving temporary retention of money by the respondent, the prosecution has not led any evidence to establish that retention of money by the respondent was with intention to defraud the Government or that the said retention was with a view to misappropriating the amount dishonestly. Having regard to the facts of the case, I am of the view that the learned Appellate Judge has rightly appreciated the evidence on record and has applied the correct principles of law to the proved facts. The acquittal of the respondent recorded by the learned Additional Sessions Judge being eminently just cannot be interfered with in the present appeal.

10. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As I am in general agreement with the view expressed by the

learned Judge, I do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in my view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & ors. v. Bijendra Narain Chaudhar, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, I am satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince me to take the view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be rejected.

For the foregoing reasons, I do not see any merits in the appeal. The appeal, therefore, fails and is dismissed.

(J.M.Panchal,J.)

(patel)